Volume 61
Issue 1 *Dickinson Law Review - Volume 61, 1956-1957*

1-1-1957

Fiduciary Federal Income Tax Returns Form 1041 and the Proposed Regulations for Sections 641-663 of the Internal Revenue Code of 1954

STATE REGULATION OF INTERSTATE COMMERCE

By CHARLES HARPER ANDERSON*

1. INTRODUCTION

THE STATES in ratifying the United States Constitution delegated to Congress the power, "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." [1] Issues concerning the retention of power over commerce by the states have continued to arise throughout the history of the Constitution.[2]

Authoritative answers to these legal questions have varied in form as well as in substance. Mechanical formulae have been created to chart the courses for state and federal power, but these courses have often involved navigational hazards. In addition to distortion and confusion created by honest attempts to paraphrase and explain, open differences of opinion have persisted.

Chief Justice John Marshall in the famous case of *Sturges v. Crowninshield*[3] charted the initial course. He explained:

> "When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the States. . . . But it has never been supposed, that this concurrent power of legislation extended to every possible case in which its exercise by the States has not been expressly prohibited. . . . Whenever the terms in which a power is granted to congress, or the nature of the power, require that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it." [4]

Although the Chief Justice was speaking in general terms, and the issue of the case involved the power to establish uniform bankruptcy laws, the idea expressed is pertinent to the commerce power. The Constitution does not expressly prohibit the states from exercising power over commerce; therefore, according to the Chief Justice's analysis, the issue whether or not the states retained power over commerce depends upon the nature of the power.[5]

In dealing with state regulations of commerce Chief Justice Marshall in *Gibbons v. Ogden*[6] held invalid a state granted monopoly to operate steamboats

---

* A.B. and B.C.L., College of William and Mary; LL.M., University of Virginia; member of the Virginia Bar; Associate Professor of Law, Marshall-Wythe School of Law, College of William and Mary.

[1] U. S. CONST. art. I, sec. 8, clause 3.

[2] See CORWIN, THE COMMERCE POWER VERSUS STATES RIGHTS; RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE; FRANKFURTER, THE COMMERCE CLAUSE.

[3] 17 U.S. (4 Wheat.) 122 (1819).

[4] *Id.* at 193.

[5] See RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE, Chapter II.

[6] 22 U.S. (9 Wheat.) 1 (1824).

within the waters of the state, yet in *Willson v. The Blackbird Creek Marsh Co.*[7] held valid state authorization of the erection of a dam across a navigable creek. The Chief Justice commented in the former case:

> "In discussing the question whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry whether it is surrendered by the mere grant to congress, or is retained until congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which congress deemed it proper to make are now in full operation." [8]

While in the latter case, he stated:

> "We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." [9]

Chief Justice John Marshall, a Federalist who was an ardent believer in building and maintaining a strong federal government,[10] used the commerce power in its "dormant" state in *Brown v. Maryland*[11] to invalidate a state law requiring an importer to obtain a license for the privilege of selling his imported goods. The nature of the power was such, in Marshall's opinion, that a state by imposing such a license tax would be interfering with the powers of Congress; yet the nature of the power did not prevent Delaware from authorizing a dam across a navigable stream as a local health measure.[12]

The attorney for the state in *Brown v. Maryland*[13] became the next Chief Justice of the United States. Roger Brooke Taney, who was an outstanding exponent of the theory of states rights,[14] faced the same old problem but from a new position. He prefaced his opinion in *The License Cases*[15] with the remark:

> ". . . I at that time [*Brown v. Maryland*] persuaded myself that I was right, and thought the decision of the court restricted the powers of the State more than a sound construction of the constitution would warrant. But further and more mature reflection has convinced me that the rule laid down by the supreme court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand and of the States on the other, and preventing collision between them." [16]

---

[7] 27 U.S. (2 Pet.) 245 (1829).
[8] 22 U.S. (9 Wheat.) 1, 200 (1824).
[9] 27 U.S. (2 Pet.) 245, 252 (1829).
[10] See BEVERIDGE, THE LIFE OF JOHN MARSHALL.
[11] 25 U.S. (12 Wheat.) 419 (1827).
[12] Wilson v. The Blackbird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829).
[13] See note 11 *supra.*
[14] See WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, Vol. II, Chapter 21.
[15] 46 U.S. (5 How.) 504 (1847).
[16] *Id.* at 575.

Chief Justice Taney, in spite of this preface, concluded with the majority of the Court[17] that a state law prohibiting the sale without license of gin irrespective of whether it had been imported from another state was constitutional. He reasoned:

> ". . . the state may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbours, and for its own territory; and such regulations are valid unless they come in conflict with a law of congress." [18]

He distinguished *Brown v. Maryland*[19] on the ground that foreign commerce was involved there, whereas merely interstate commerce was involved in *The License Cases.*[20]

The issue of the validity of a state statute regulating pilots and pilotage arose five years later. Mr. Justice Curtis in *Cooley v. Board of Port Wardens*[21] rendered the opinion of the Court in which Chief Justice Taney concurred. He stated:

> "Now, the power to regulate commerce, embraces a vast field, containing not only many but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question as imperatively demanding that diversity, which alone can meet the local necessities of navigation." [22]

Although Chief Justice Roger Brooke Taney may have seen consistency in the results of *Brown v. Maryland,*[23] *The License Cases,*[24] and *Cooley v. Board of Port Wardens,*[25] the form and probably the substance of the rule had been changed. The emphasis has shifted from the nature of the power to the nature of the subjects of the power.[26]

Mr. Justice Curtis conceded that the states by virtue of the power to regulate for the general welfare and well being of their citizens could regulate subjects that were a part of interstate commerce provided such matters were local in nature and Congress had not regulated such matters. Two issues, therefore, were to be considered in applying this formula: (1) Had Congress occupied the field? (2) Was the matter local in nature?

---

[17] There was no court opinion rendered; the opinions were rendered *seriatim.* See Morgan, JUSTICE WILLIAM JOHNSON, THE FIRST DISSENTER, Chap. X, for discussion of the history of rendering *seriatim* opinions in lieu of a Court opinion.

[18] 46 U.S. (5 How.) 504 (1847).

[19] See note 11 *supra.*

[20] See note 15 *supra.*

[21] 53 U.S. (12 How.) 299 (1852).

[22] *Id.* at 319.

[23] See note 11 *supra.*

[24] See note 15 *supra.*

[25] See note 21 *supra.*

[26] See RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE, Chapters II and III.

The Court in resolving the first issue must ascertain the intent of Congress. Did Congress in enacting particular statutes intend to include a particular area so as to exclude all other regulation of that area?[27] The Court could consider the words of the statute, the history of the legislation, the nature of the subject, the nature of the regulation, and all other pertinent factors to solve this problem. The Court, after concluding that Congress had not occupied the field, could consider the subject matter of the state regulation to determine whether it was local or national in nature.

The creation of this formula did not by any means prevent litigation in this field. Just as there had been differences in the past in solving such problems there continued to be differences in the future. The Court, in passing on an Iowa statute[28] which prohibited a common carrier from bringing intoxicating liquor within the state without obtaining a license from a designated state official, stated:

> "The question, therefore, may be still considered in each case as it arises, whether the fact that congress has failed in the particular instance to provide by law a regulation of commerce among the states is conclusive of its intention that the subject shall be free from all positive regulation, or that, until it positively interferes, such commerce may be left to be freely dealt with by the respective states. . . . In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several states of the Union, it cannot be supposed that the constitution or congress has intended to limit the freedom of commercial intercourse among the people of the several states." [29]

The Court thus concluded that Congress had occupied the field in spite of the fact that Congress had not enacted legislation in this area. The issue was whether the Court thought that Congress by its silence had intended to occupy the field. The nature of the subject matter, local or national, was not the determining factor even though Congress had not legislated concerning the matter.[30]

---

[27] See *infra.*

[28] Section 1553, IOWA CODE, 1886: "If any express company, railway company, or any agent or person in the employ of any express company or railway company, or if any common carrier, or any person in the employ of any common carrier, or any person, knowingly bring within this state for any person or persons or corporation, or shall knowingly transport or convey between points, or from one place to another, in this state, for any other person or persons or corporation, any intoxicating liquors, without first having been furnished a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported, or is consigned for transportation, or within which it is to be conveyed from place to place, certifying that the consignee or person to whom said liquor is to be transported, conveyed, or delivered is authorized to sell such intoxicating liquors in such county, such company, corporation, or person so offending, and each of them, and any agent of such company, corporation, or person so offending shall upon conviction thereof be fined. . . ."

[29] Bowman et al. v. Chicago & N. W. Ry. Co., 125 U.S. 465, 483, 494 (1888).

[30] Mr. Justice Field concurred in the Court's result but based his conclusion on the fact that the subject matter was not local in nature.

Still another variation of the *Cooley*[31] doctrine occurred in the case of *Hall v. DeCuir.*[32] A Louisiana statute[33] required carriers to furnish accommodations to passengers irrespective of race or color. In holding the statute unconstitutional, Mr. Justice Waite, speaking for the Court, stated:

> ". . . it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of congress." [34]

If the Court considered a direct burden on commerce to be a state regulation in a field which demanded uniformity and an indirect burden on commerce to be in a field which did not demand uniformity, the direct-indirect burden test was merely the *Cooley*[35] formula in different words.[36] If other meanings were attributed to direct and indirect, a diversion from the *Cooley*[37] formula was made. The difference between a direct and an indirect burden cannot in general be determined with mathematical precision. The presence of one is the exclusion of the other. The difference, therefore, can be a matter of degree to be determined by the Court where and when the Court desires.

2. Congressional and State Legislation

During the latter part of the nineteenth century, Congress began to enact positive regulations based upon its commerce power.[38] As the national economy grew, so did the number and scope of the regulations. The Court at times was hesitant to permit regulations of matters which Congress considered interstate

---

[31] See note 21 *supra.*

[32] 95 U.S. 485 (1878).

[33] La. Acts of 1869, p. 37: "Section 1. All persons engaged within this State, in the business of common carriers of passengers, shall have the right to refuse to admit any person to their railroad cars, street cars, steamboats, or other water-crafts, stage-coaches, omnibuses, or other vehicles, or to expel any person therefrom after admission, when such person shall, on demand, refuse or neglect to pay the customary fare, or when such person shall be of infamous character, or shall be guilty, after admission to the conveyance of the carrier, of gross, vulgar, or disorderly conduct, or who shall commit any act tending to injure the business of the carrier, prescribed for the management of his business, after such rules and regulations shall have been made known: *Provided,* said rules and regulations make no discrimination on account of race or color; and shall have the right to refuse any person admission to such conveyance where there is not room or suitable accommodations; and, except in cases above enumerated, all persons engaged in the business of common carriers of passengers are forbidden to refuse admission to their conveyances, or to expel therefrom any person whomsoever."

"Section 4. For a violation of any of the provisions of the first and second sections of this act, the party injured shall have a right of action to recover any damage, exemplary as well as actual, which he may sustain, before any court of competent jurisdiction."

[34] 95 U.S. 485, 488 (1878).

[35] See note 21 *supra.*

[36] *Cf.* Morgan v. Virginia, 320 U.S. 373, 377 (1946), Mr. Justice Reed: "There is a recognized abstract principle, however, that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress is beyond state power. This is that the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose."

[37] See note 21 *supra.*

[38] Interstate Commerce Act, 1887, 24 Stat. 378, 49 U.S.C. § 1 (1929); Sherman Anti-Trust Act, 1890, 26 Stat. 209, 15 U.S.C. § 4 (1951).

commerce, but the Court in 1942 concluded that, ". . . the federal commerce power is as broad as the economic needs of the nation." [39]

Did the positive use of the commerce power by Congress decrease by direct proportion the power of the states? [40] Insofar as Congress legislated in fields of commerce and intended to occupy those fields, then acocrding to the *Cooley* [41] formula, state power no longer existed in those fields. It made no difference whether it was a matter of local concern or not; if Congress occupied the field, state legislation and power in that field were supplanted. If the matter was of such a nature as to demand uniformity of regulation, state power to regulate did not exist and failure to occupy the field by Congress was immaterial.

(a) *Congressional Consent to State Legislation*

If the subject matter were such that it demanded uniformity of regulation, could Congress by positive action permit the states to regulate that field? The effect of such action would be that Congress would supplant the Court in applying the *Cooley* [42] formula and concluding that the subject matter did not demand uniformity of regulation. When the Court previously considered the same matter as demanding uniformity of regulation, the Court prevented the states from entering the field. Since Congress wanted to leave the matter to the states, the will of Congress, therefore, changed the result. [43]

The basic problem, an alleged unconstitutional delegation of legislative power, was solved in a case involving the liquor question. [44] Such diversity of opinion had existed on the problem that the President of the United States on the advice of the Attorney General vetoed the legislation on the ground that it was unconstitutional. [45] Congress, nevertheless, passed the Act [46] over the Presi-

---

[39] American Power & Light Co. v. Securities & Exchange Commission, 329 U.S. 90, 103-104 (1946).

[40] See Douglas, *Recent Trends in Constitutional Law,* 30 ORE. L. REV. 279, 286 (1951): "The trend has been to sustain state regulation that in an earlier day probably would have been regarded as inconsistent with the unexercised power which Congress has over commerce. The short of it is that in the last decade or so there has been an increasing recognition by the Court both of state legislative power and of Federal legislative power. There is Federal supremacy only (a) when the local law discriminates against interstate commerce; (b) when the local law conflicts with a Federal act; or (c) where the matter regulated is one which calls peculiarly for Federal regulation."

[41] See note 21 *supra.*

[42] *Ibid.*

[43] See Dowling, *Interstate Commerce and State Power—Revised Version,* 47 COL. L. REV. 547 (1947).

[44] Clark Distilling Co. v. Western Maryland Ry. Co., 242 U.S. 311 (1917).

[45] See Opinion of the Attorney General, 30 OPS. ATTY. GEN. 88; Veto Message of President Taft, 49 CONG. REC. 4291.

[46] The Webb-Kenyon Act of Congress of March 1, 1913, 37 STAT. 699, 27 U.S.C. § 122 (1927): "An Act Divesting Intoxicating Liquors of Their Inter-State Character in Certain Cases . . . That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States . . . into any other state, territory, or district of the

dential veto. The Court treated the legislation not as a delegation of power but as an assertion of the will of Congress to regulate in various ways in cooperation with the states. The Court reasoned that since Congress has the power to make a complete prohibition, Congress could, therefore, exercise a part of that power.[47]

The same method of cooperation between Congress and the states was used in connection with the regulation of the sale of prison made goods and the subject of insurance. Congress in passing the Ashurst-Summers Act[48] made it unlawful to transport in interstate commerce goods made by convict labor into any state where the goods were to be received, possessed, sold, or used in violation of state law. The Kentucky Whip and Collar Company used convict labor to manufacture goods and then tendered the goods to the Illinois Central Railroad Company for shipment. Since some of the goods were consigned to destinations in states which prohibited their sale, the Railroad Company refused to accept them. In supporting the position of the Railroad by upholding the constitutionality of the statute, the Court stated:

> "The pertinent point is that where the subject of commerce is one as to which the power of the state may constitutionally be exerted by restriction or

---

United States . . . which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the United States . . . is hereby prohibited." Congress had previously enacted the Wilson Act, 26 STAT. 313, which subjected intoxicating liquors to state power "upon arrival in such state." The constitutionality of this Act was upheld, in re Rahrer, 140 U.S. 545 (1891); but the Court interpreted "arrival" in a state to mean "arrival at the point of destination and delivery there to the consignee," which defeated the purpose of the Wilson Act. Rhodes v. Iowa, 170 U.S. 412, 426 (1898). Prior to the Wilson Act the case of Leisy v. Hardin, 135 U.S. 100 (1890), had negated the results of The License Cases, 46 U.S. (5 How.) 504 (1847), by applying the original package doctrine to state regulations pertaining to intoxicating liquors.

[47] See note 43 *supra.*

[48] 49 STAT. 494 (1935), 49 U.S.C. §§ 61-64 (1951): "Section 1. That it shall be unlawful for any person knowingly to transport or cause to be transported in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting any goods, wares, and merchandise manufactured, produced, mined wholly or in part by convicts or prisoners (except convicts or prisoners on parole or probation), or in any penal or reformatory institution, from one State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place non-contiguous thereof, or from any foreign country, into any State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, where said goods, wares, and merchandise are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof. Nothing herein shall apply to commodities manufactured in Federal penal and correctional institutions for use by the Federal Government.

"Section 2. All packages containing any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package."

prohibition in order to prevent harmful consequences, the Congress may, if it sees fit, put forth its power to regulate interstate commerce so as to prevent that commerce from being used to impede the carrying out of state policy." [49]

The exercise of state power must normally conform to the restrictions of the Fourteenth Amendment[50] as well as the commerce clause, but where Congress removes the problems which might be occasioned by the commerce clause, the Fourteenth Amendment remains as the potential obstacle. As long as the regulation is not arbitrary or clearly unreasonable in substance or operation, the regulation complies with the requirements of the Fourteenth Amendment.[51]

As a result of the *Southeastern Underwriters* case[52] in which the Court held that insurance constituted interstate commerce for the purpose of enforcing the Sherman Anti-Trust Act, Congress enacted the McCarran Act, which provided: "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." [53]

South Carolina levied a license tax[54] of 3% of the aggregate of premiums received from business done in South Carolina by out of state insurance companies although no similar tax was required of South Carolina corporations.[55] The Court upheld in strong terms the validity of the state statute as well as the McCarran Act.[56] In pointing out the possible limits to the fields of cooperation between the states and the federal government, the Court stated:

"Clear and gross must be the evil which would nullify such an exertion, one which could arise only by exceeding beyond cavil some explicit and com-

---

[49] Kentucky Whip & Collar Co. v. Illinois Cent. R. Co., 299 U.S. 334, 351 (1937).

[50] U. S. CONST. Amendment Fourteen: "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[51] See, for example, Jacobson v. Massachusetts, 197 U.S. 11 (1905); Powell v. Pennsylvania, 127 U.S. 678 (1888); Mugler v. Kansas, 123 U.S. 623 (1887); Buck v. Bell, 274 U.S. 200 (1927); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[52] United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944).

[53] Section 2(a), 59 STAT. 34 (1945), 15 U.S.C. §§ 1011-1015 (1951). Section 2(b) provides: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically related to the business of insurance. . . ." See McCarran, *Federal Control of Insurance: Moratorium under Public Law 15 Expired July 1,* 34 A.B.A.J. 539 (1948).

[54] § 7948 and § 7949, SOUTH CAROLINA CODE, 1942.

[55] Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946), footnote of the Court: "Sections 7948 and 7949 expressly exempt South Carolina corporations from payments of the tax. They however are subject to other taxes, which Prudential maintains have no bearing upon the issues, other than possibly to demonstrate the discriminatory character and effects of the exaction in issue. . . . These are chiefly taxes on real and personal property, incidence of which Prudential largely escapes by the location of its property in other states."

[56] Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946).

pelling limitation imposed by a constitutional provision or provisions designed and intended to outlaw the action taken entirely from our constitutional framework." [57]

The size, scope, and importance to national commerce of insurance had been compelling factors to the Court in justifying federal power in the *Southeastern Underwriters* case;[58] therefore, in spite of the fact that the states had regulated insurance prior to that time, Congress potentially surrendered a large and important field to state power. In view of the language of the Court, expressing merely an "explicit and compelling limitation imposed by a constitutional provision" as the limitation on the use of this method of federal-state cooperation, the chief deterrent to the use of such methods would seem to be the will of Congress.

Judicial problems, however, will continue to arise in spite of federal-state cooperation. The extent of the field of cooperation, for example, suggests problems of definition.

Congress enacted the Miller-Tydings Act of 1937[59] which provided in material part "that nothing contained herein shall render illegal, contracts, or agreements prescribing minimum prices for the resale of specified commodities when contracts or agreements of that description are lawful as applied to intrastate transactions" under local law. The Court held, however, that this statute did not legalize such contracts against non-consenting parties even though state law[60] did permit it.[61]

The determination of the scope of the field of federal-state cooperation is similar to the process of determining the occupation of a field by Congress.

(b) *Congressional Occupation of the Field*

If an act of Congress conflicts with a state statute, it makes no difference which one was enacted first; as between the two, the federal statute is the supreme law of the land, and the state statute is void.[62] A more difficult question is presented when the state statute does not necessarily conflict with the federal

---

[57] *Id.* at 436.

[58] See note 52 *supra.*

[59] 50 STAT. 693 (1937), 15 U.S.C. § 1 (1951).

[60] Act No. 13 of 1936, LA. GEN. STAT. §§ 9808.1 et seq., ISA-RS 51:391.

[61] Schwegmann Bros. et al. v. Calvert Distillers Corp., 341 U.S. 384 (1951); Justices Frankfurter, Black, and Burton dissented.

[62] U.S. CONST. art. VI, clause 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to Contrary notwithstanding."

statute.[63] The state statute, for example, may provide exactly the same things as the federal statute, that is, be concurrent, or the state statute may regulate a matter quite similar and close to the matter regulated by the federal statute but not exactly the same.

The controlling factor is the intent of Congress. Did Congress intend its regulation to be exclusive in that particular field? If the state and federal regulations are not concurrent, the issue will involve the scope of the field which is determined by the intent of Congress. If the regulations fall in the same field, the issue is the exclusiveness of the federal regulation which again is determined by the intent of Congress.

In the case of *Charleston & W. C. R. Co. v. Varnville F. Co.*,[64] which involved state and federal statutes[65] regulating the same thing in a similar manner, Mr. Justice Holmes, speaking for the Court, observed:

> "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." [66]

If Mr. Justice Holmes meant that the mere enactment of a statute by Congress constituted "taking the particular subject-matter in hand", then a mechanical formula for declaring the state statute void was established, but if he meant that congressional intent to occupy the field constituted "taking the particular subject-matter in hand", then the basic problem of determining congressional intent remained.

In *People of State of California v. Zook, et al*,[67] which involved a state statute prohibiting the arrangement of transportation over the state highways if the transporting carrier did not have a permit from the Interstate Commerce Commission, the Court concluded that the state statute was valid even though a similar federal statute existed.[68] The "coincidence" rationale was discarded as a mechanical formula but accepted as merely one factor to be considered in ascertaining congressional intent.[69]

---

[63] See Note, *"Occupation of the Field" in Commerce Clause Cases 1936-1946: Ten Years of Federalism*, 60 HARV. L. REV. 262 (1946); Note, *Congressional Pre-emption by Silence of the Commerce Power*, 42 VA. L. REV. 43 (1956).

[64] 237 U.S. 597 (1915).

[65] SOUTH CAROLINA CIVIL CODE 1912, § 2573. Act to Regulate Commerce, especially § 20, as amended by the act of June 29, 1906, c. 3591, 34 STAT. 584, 593, 49 U.S.C. § 20 (1951), known as the Carmack Amendment.

[66] 237 U.S. 597, 604 (1915).

[67] 336 U.S. 725 (1949).

[68] 54 STAT. 919 (1940), 49 U.S.C. §§ 301, 303(b) (1951).

[69] 336 U.S. 725, 729 (1949), Mr. Justice Murphy: "The Court could not have intended to enunciate a mechanical rule, to be applied whatever the other circumstances indicating congressional intent. Neither the language nor the facts of the cases cited support an approach in such marked contrast with this Court's consistent decisional bases." Justices Burton, Douglas, Frankfurter, and Jackson dissented.

General rules of statutory interpretation, such as consideration of the legislative history of the act, the particular circumstances which motivated the legislature, the purpose of the act, etc., are helpful in determining congressional intent, but no one rule of interpretation is conclusive.[70]

If the subject matter of a regulation is in a field which traditionally has been regulated by the states, the Court requires that there must be a clear purpose on the part of Congress to oust the states from this field and thus invalidate the state regulations.[71] This clear purpose can be shown by express congressional provision to make the field exclusive, by the fact that the congressional regulation is so pervasive that no room is left in the field for state regulation,[72] the federal interest in the particular field has become so dominant that the states are precluded from regulating that field,[73] or the policy of the state regulation will produce results which conflict with the purpose of the federal statute.[74]

Although punishment by both a state and the federal government for committing the same act does not constitute double jeopardy, it is one fact which can be considered in determining congressional intent.[75] Legislative bodies as well as society in general tend to abhor punishment for the same act. There is no all inclusive test to determine congressional intent. Every pertinent factor should be considered.

3. State Power v. Commerce Clause

(a) *Commerce as Movement*

Chief Justice John Marshall thought of interstate commerce as "that commerce which concerns more states than one",[76] whereas some members of the Court since Marshall's time visualized interstate commerce as movement of goods or people from one state to another for commercial purposes.[77] The movement rationale was a motivating factor in producing and justifying broad congressional regulation.[78] Movement between the various states was a just cause for congressional regulation since no one state could regulate or control the entire movement between two or more states. But movement and facilities for movement did not prevent the states from regulating phases and parts of

---

[70] See *A Symposium on Statutory Construction,* 3 VAND. L. REV. 365 (1950).
[71] Rice et al. v. Santa Fe Elevator Corporation et al., 331 U.S. 218 (1947).
[72] Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942).
[73] Hines v. Davidowitz, 312 U.S. 52 (1941).
[74] Hill v. Florida, 325 U.S. 538 (1945).
[75] Moore v. Illinois, 55 U.S. (14 How.) 13 (1852).
[76] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824).
[77] See RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE, pp. 130-131.
[78] Stafford v. Wallace, 258 U.S. 495 (1922); National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937); Mulford v. Smith, 307 U.S. 38 (1939); United States v. Darby, 312 U.S. 100 (1941).

the movement in order to protect local interests.[79] The states could under the *Cooley*[80] formula regulate local matters in fields which Congress had not occupied.

State regulations concerning speed and various other features of trains moving in interstate commerce were sustained on the theory that the safety problems involved were local in nature, and Congress had not occupied the field.[81] As commercial trucking expanded and became more extensive, it was natural that regulation would soon follow.

Although Congress enacted the Federal Motor Carrier Act,[82] the South Carolina legislature enacted a law which prohibited the use on the state highways of motor trucks and semi-trailer motor trucks whose width exceded 90", and whose weight including load exceeded 20,000 lbs.[83] For purposes of weight a semi-trailer was considered a single unit. Truckers, assisted by the Interstate Commerce Commission, sought to enjoin enforcement of the law whereas the state, assisted by the railroads, sought to enforce the law. After noting that Congress had not attempted to regulate weight and size of trucks, the Court concluded that Congress had not occupied the field. Applying the *Cooley* formula,[84] the Court stated:

> "Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulations of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned, and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse." [85]

---

[79] Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 215 (1829); the License Cases, 46 U.S. (5 How.) 504 (1847); Cooley v. Board of Wardens of the Port of Philadelphia, 53 U.S. (12 How.) 299 (1851).

[80] See note 21 *supra.*

[81] Southern Railway Co. v. King, 217 U.S. 524 (1910); *cf.* Seaboard Air Line R. Co. v. Blackwell, 244 U.S. 310 (1917), where the state statute was held to be a direct burden on interstate commerce because of the particular facts, viz., the number of grade crossings, etc.

[82] Federal Motor Carrier Act of 1935, 49 STAT. 546, 49 U.S.C. § 304 (1951).

[83] Act No. 259 of the General Assembly of South Carolina, of April 28, 1933, 38 ST. AT LARGE, p. 340: "Section 4. Weight—No person shall operate on any highway any motor truck or semi-trailer truck *(sic)* whose gross weight, including load, shall exceed 20,000 pounds." "Section 6. Width—No person shall operate on any highway any motor truck or semi-trailer motor truck whose total outside width, including any part of body or load, shall exceed 90 inches."

[84] See note 21 *supra.*

[85] South Carolina State Highway Department et al. v. Barnwell Bros., Inc., et al., 303 U.S. 177, 187 (1938).

The Court conceded that the state regulation was a burden on interstate commerce but concluded that it was a justifiable burden in view of the particular circumstances and the fact that there was no discrimination against interstate commerce. The Court left the issue whether the burden was too great for Congress. The Court concluded that since the regulation was not clearly unreasonable, it was valid.

Since the Court concluded that regulations concerning the use of highways were matters of local concern, it would seem *a fortiori* that state regulation of matters further removed from the actual interstate movement would be local in nature. The difficulty, however, was that the Court had previously established a precedent in *Di Santo v. Pennsylvania*[86] which was inconsistent with this rationale. A unanimous Court, however, expressly overruled the *Di Santo* case in *California v. Thompson.*[87] Both of these cases involved state statutes regulating transportation agents,[88] who sold tickets or arranged transportation involving interstate (foreign in the *Di Santo* case) transportation. Since the business was even further removed from the interstate movement than regulations concerning the use of the highways, it was deemed a matter of local concern.

State regulations of events or persons at the completion of the interstate movement would by the same rationale seem to be permissable. Since the movement has been completed, the subject matter should be classified as local in nature, but again precedents have troubled the Court in this field. The Court has continually maintained and held that a state cannot impose a license tax on an out of state drummer for the privilege of soliciting orders because such a tax would constitute taxation of interstate commerce and thus tend to prevent interstate commerce.[89] Local merchants have had to compete with out of state solicitors in spite of the fact that the out of state solicitors have a local tax advantage.

Alexandria, Louisiana, however, enacted an ordinance which prohibited door-to-door soliciting unless the householder first invited the solicitation.[90]

---

[86] 273 U.S. 34 (1927).

[87] 313 U.S. 109 (1941).

[88] The Act of the Pennsylvania Legislature of July 17, 1919, as amended by the Act of May 20, 1921, P.L. 997, required a license to sell steamship tickets or orders for transportation to or from a foreign country. Section 2 of California Statutes of 1933, Ch. 390, p. 1011, as amended by Ch. 665, Statutes of 1935, p. 1833, required every transportation agent to procure a license. Section 1 defined such agent as one who "sells or offers to sell or negotiate for" transportation over the public highways of the state.

[89] Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887); Nippert v. Richmond, 327 U.S. 416 (1946).

[90] "Section 1. Be it ordained by the council of the city of Alexandria, Louisiana, in legal session convened that the practice of going in and upon private residences in the City of Alexandria, Louisiana by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited so to do by the owner or owners, occupant or

In *Breard v. Alexandria*[91] the issue of constitutionality of the ordinance as applied to an out of state solicitor was presented to the Court. The majority of the Court viewed the subject matter as being sufficiently removed from the interstate movement to be local in nature but did not overrule the troublesome precedents as they had done in *California v. Thompson.*[92] They, however, distinguished the previous cases as follows:

> "When there is a reasonable basis for legislation to protect the social, as distinguished from the economic, welfare of a community, it is not for this Court because of the Commerce clause to deny the exercise locally of the sovereign power of Louisiana." [93]

The Court recognized that the practical result was to take away the existing advantages (including taxation) which the out of state solicitor had over local merchants.

> "To solicitors so engaged, ordinances such as this compel the development of a new technique of approach to prospects." [94]

The difficulty of distinguishing between a prohibition of door-to-door soliciting as a real social regulation and as a subterfuge to prevent economic competition with local merchants is obvious. The Court, in advising salesmen to develop new techniques, is suggesting that such regulations will be upheld as regulations of local social matters wherever reasonable basis for such classification exists.

The result is consistent with the rationale of interstate commerce as movement. Matters and events occurring at the end or at the beginning of the movement should tend to be local in nature whereas the entire movement or phases occurring in the center of the movement should tend not to be local in nature.

Edwards v. California,[95] which involved a statute[96] making it a crime to bring or to assist in bringing a nonresident indigent person into the state, illustrates a prohibition of the entire movement.

---

occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor." Ordinance No. 500 of the City of Alexandria, Louisiana.

[91] 341 U.S. 622 (1951). Chief Justice Vinson and Justices Black and Douglas dissented.

[92] See note 87 *supra.*

[93] 341 U.S. 622, 640 (1951).

[94] *Id.* at 639.

[95] 314 U.S. 160 (1941).

[96] Section 2615 of the Welfare and Institutions Code of California, St. 1937, p. 1406: "Every person, firm or corporation, or officers or agent thereof that brings or assists in bringing into the State any indigent person who is not a resident of the State, knowing him to be an indigent person, is guilty of a misdemeanor."

The purpose of the California statute was to attempt to alleviate the growing relief problem caused by the migration of victims of the economic depression and drought from other sections of the country.[97] In holding the statute unconstitutional, the Court said:

> "Its (the statute) express purpose and inevitable effect is to prohibit the transportation of indigent persons across the California border. The burden upon interstate commerce is intended and immediate; it is the plain and sole function of the statute. Moreover, the indigent non-residents who are the real victims of the statute are deprived of the opportunity to exert political pressure upon the California legislature in order to obtain a change in policy." [98]

In the case involving the South Carolina regulation of the weight and size of trucks,[99] the Court concluded that the South Carolina statute imposed a burden on interstate commerce but left the question of the degree of the burden for Congress. The burden imposed upon interstate commerce by the California statute made the statute unconstitutional. The burden under the California regulation, however, amounted to a complete prohibition of that type of commerce, whereas, the burden under the South Carolina regulation did not prevent all interstate truck movement but merely that which involved truck weights and sizes in excess of that prescribed by the statute. The South Carolina regulation affected intrastate as well as interstate commerce, whereas, the California regulation affected only interstate commerce. Since the entire movement was prohibited, it was more than a matter of local concern and thus beyond state power.

If a state regulation does not extend to the prohibition of the entire movement of a particular area of commerce, but merely prescribes the manner in which a central part of the movement is to be performed, a closer issue to test the movement rationale is presented.

A Virginia statute required the segregation of passengers of public motor carriers according to race and made it a misdemeanor for any passenger to refuse to change seats as required by the driver to carry out the policy.[100] The regula-

---

[97] The statute was commonly referred to as the anti-okie statute.

[98] 314 U.S. 160, 174 (1941).

[99] See note 85 *supra.*

[100] VIRGINIA CODE, 1942, §§ 4097 to 4097dd inclusive: "4097dd. Violation by passengers; misdemeanors; ejection—All persons who fail while on any motor vehicle carrier, to take and occupy the seat or seats or other space assigned to them by the driver, operator or other person in charge of such vehicle, or by the person whose duty it is to take up tickets or collect fares from passengers therein, or who fail to obey the directions of any such driver, operator or other person in charge, as aforesaid, to change their seat from time to time as occasions require, pursuant to any lawful rule, regulation or custom in force by such lines as to assigning separate seats or other space to white and colored persons respectively, having been first advised of the fact of such regulation and requested to conform thereto, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars for each offense. Furthermore, such persons may be ejected from such vehicles by any driver, operator or person in charge of said vehicle, or by any police officer or other conservator of the peace; and in case such persons ejected

tion was effective with trips originating in Virginia the moment the passenger entered the bus and in that sense was close to the beginning of the movement.[101] The regulation was effective with trips originating outside of Virginia upon reaching the Virginia border and in that sense was in the middle of the movement. Since the statute applied irrespective of whether the trip originated within the state, the regulation was directly connected with the movement.

In holding the statute unconstitutional, the Court stated *(Morgan v. Virginia):*

> "There is a recognized abstract principle, however, that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress is beyond state power. This is that the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose. . . . A burden may arise from a state statute which requires interstate passengers to order their movement on the vehicle in accordance with local rather than national requirements." [102]

Since the Court was speaking of burdens on commerce as being in those fields that demand uniformity of regulation, the Court was classifying the subject of interstate passengers as national and not local in nature. The classification of the subject matter of the regulation under the *Cooley* formula depended upon the nature of that subject matter and not the nature of the regulation. The subject matter—interstate passengers—was directly involved in the movement; therefore, the result was consistent with the movement rationale.

The Supreme Court, however, upheld the constitutionality of a Michigan anti-discrimination statute[103] as applied to the Bob-Lo Excursion Company[104]

---

shall have paid their fares upon said vehicle, they shall not be entitled to the return of any part of same. For the refusal of any such passenger to abide by the request of the person in charge of said vehicle, neither the driver, operator, person in charge, owner, manager, nor bus company operating said vehicle shall be liable for damages in any court."

[101] *Cf.* South Carolina State Highway Department et al. v. Barnwell Bros., Inc., 303 U.S. 177 (1938). Even with trips originating in Virginia the regulation was closer to the actual movement than a regulation of the weight and size of vehicles which are to be used in movement that has not yet begun.

[102] 328 U.S. 373, 377 (1946); Justice Burton dissented.

[103] MICH. PENAL CODE §§ 146-148, as amended by Act No. 117, Mich. Pub. Acts 1937, MICH. COMP. LAWS (Supp. 1940), §§ 17115-146 to 17115-148, MICH. STAT. ANN. (1946 Cum. Supp.), §§ 28.343-28.346: "Section 146. All persons within the jurisdiction of this state shall be entitled to full and equal accommodations, advantages, facilities, and privileges of inns, hotels, restaurants, eating houses, barber shops, billiard parlors, stores, public conveyances on land and water, theatres, motion picture houses, public educational institutions, in elevators, on escalators, in all methods of air transportation and all other places of public accommodation, amusement, and recreation, where refreshments are or may hereafter be served, subject only to the conditions and limitations established by law and applicable alike to all citizens and to all citizens alike, with uniform prices." Violation of the statute constituted a misdemeanor and also subjected the violator to civil liability for treble damages.

[104] Bob-Lo Excusion Co. v. People of State of Michigan, 333 U.S. 28 (1948).

which operated steamships to and from its amusement area on an island located on the Canadian side in the Detroit River. The Court, comparing the *Morgan* case, said:

> "The regulation of traffic along the Mississippi River, such as the Hall case comprehended and of interstate motor carriage of passengers by common carriers like that in the Morgan case, are not factually comparable to this regulation of appellant's highly localized business and those doctrines are not relevant here." [105]

The Court did not deny that foreign commerce existed and that the regulation was effective throughout the movement within the state just as the Virginia regulation was in the *Morgan* case. Since the termini were relatively close together, and the entire purpose of the trips was for local recreation, the Court implied that the subject matter was merely local, but the fact remains that there was movement to and from a foreign country (Canada); therefore, foreign and not intrastate commerce existed. The subject matter of passengers moving in interstate or foreign commerce was either local or not local in nature. Since the results of the *Morgan* and *Bob-Lo Excursion Company* cases were inconsistent on this point, neither case convincingly proves the truth of the movement rationale.

The Court in the *Bob-Lo Excursion Company* case also noted:

> "It is difficult to imagine what national interest or policy, whether of securing uniformity in regulating commerce, affecting relations with foreign nations, or otherwise, could reasonably be found to be adversely affected by applying Michigan's statute to these facts or to outweigh her interest in doing so. Certainly there is no national interest which overrides the interest of Michigan to forbid the type of discrimination practiced here." [106]

The implication is that the nature of the regulation rather than the nature of the subject matter is the determining factor. The regulation is always considered by the Court in order to determine if there is discrimination against interstate commerce, but discrimination was not an issue in either the *Morgan* or the *Bob-Lo Excursion Company* cases. The real distinction lies outside of the field of interstate commerce and under the Fourteenth Amendment. Since segregation in the public schools by the states according to race is no longer compatible with the equal protection of the laws clause,[107] the Virginia statute in the *Morgan* case would probably be held invalid today under the Fourteenth Amendment. This, however, does not mean that the doctrine of the *Morgan* case under the commerce clause would be abandoned and the *Bob-Lo Excursion*

---

[105] *Id.* at pp. 39-40.
[106] *Ibid.*
[107] Brown v. Board of Education, 349 U.S. 294 (1955).

Company case would constitute the precedent for the future. Passengers in transit are indeed a broad subject which is susceptible to further division. Parts of this broad subject, such as safety and health matters, could conceivably be classified local in nature. The Court would undoubtedly reach the same result today if the facts of the *Bob-Lo Excursion Company* case were to arise again because that result is consistent with the policy of preventing racial discrimination.

It must be concluded at this point that even though a state regulation occurs in the center of the interstate movement, the subject matter of the regulation can be local in nature. There must, however, be a justifiable reason for such classification. This, of course, modifies the previous statement of the movement rationale to this extent: all other factors being equal, it is more likely that events occurring at the end or beginning of the movement are local in nature than events occurring in the center of the movement. This leads to a consideration of the type of reasons which cause events occurring during the movement to be classified as local in nature.

San Diego County, California, required the operator of every taxicab to get a permit from the Sheriff.[108] Some taxicab drivers, who picked up passengers in Mexico and drove through San Diego County into the city of San Diego where they discharged their passengers, refused to obtain permits. The Supreme Court, nevertheless, upheld the validity of the county requirement even though the trips involved constituted foreign commerce without convenient breaks in San Diego County.[109] The Court reasoned:

> "Operation of taxicabs across state lines or international boundaries is so closely related to the local situation that the regulation of all taxicabs operating in the community only indirectly affects those in commerce, and so long as there is no attempt to discriminatorily regulate or directly burden or charge for the privilege of doing business in interstate or foreign commerce, the regulation is valid." [110]

---

[108] § 9 of Ordinance 464, San Diego County, California: "Applicants for such permits shall file applications therefor with the sheriff of the County of San Diego on a form furnished by the sheriff which, when completed, will contain full personal information concerning the applicant. Upon obtaining a permit as herein required the holder of such permit shall be entitled to an identification card of such design, and bearing such number as the sheriff may prescribe, upon payment of a fee of $1.00 annually therefor, which shall be paid by the applicant to the tax collector and shall be due on the 1st day of June of each year. Such card shall be carried by the permitee during all business hours and shall not be transferable.

"Each applicant for a permit shall be examined by the sheriff as to his knowledge of the provisions of this ordinance, the Vehicle Code, traffic regulations and the geography of the county, and if the result of the examination is unsatisfactory he shall be refused a permit. The sheriff may deny the application or having issued the permit may revoke the same if the sheriff shall determine that the applicant or taxicab driver is of bad moral character or is guilty of violation of any of the provisions of this ordinance or of any lawful regulation promulgated pursuant thereto or has been convicted of any offense involving moral turpitude."

[109] Buck et al. v. People of State of California, 343 U.S. 99 (1952).

[110] *Id.* at 102.

The movement facts—that the regulation occurred in the center of the movement, and that the termini of the movement were not within the political area of the regulation—were not controlling. The nature of the method of movement, however, was important in determining whether the matter was local or national. Since operation of taxicabs has been traditionally a local matter, the local regulation was valid.[111]

One criterion for determining classification, irrespective of movement, has thus been history. If the states have traditionally regulated the matter, it presumably is a local matter. If the federal government has traditionally regulated the matter, it makes no difference under the *Cooley* formula whether it is local or not local because Congress has occupied the field. If neither the states nor the federal government has regulated the matter, this criterion would not apply.

Such a situation was presented by the case of *Southern Pacific Co. v. Arizona.*[112] An Arizona statute,[113] which made it unlawful to operate within the state a railroad train of more than 14 passengers or 70 freight cars, was held unconstitutional. Although certain matters of safety, such as speed, in connection with the operation of trains had been traditionally handled by the states,[114] there was no historical criterion for measuring a regulation of train lengths. The Court justified its conclusion as follows:

> "Here we conclude that the state does go too far. Its regulation of train lengths, admittedly obstructive to interstate train operation, and having a seriously adverse effect on transportation efficiency and economy, passes beyond what is plainly essential for safety since it does not appear that it will lessen rather than increase the danger of accident. Its attempted regulation of the operation of interstate trains cannot establish nationwide control such as is essential to the maintenance of an efficient transportation system, which Congress alone can prescribe. The state interest cannot be preserved at the expense of the national interest by an enactment which regulates interstate train lengths without securing such control, which is a matter of national concern. To this the interest of the state here asserted is subordinated." [115]

---

[111] *Cf.* operation of ships. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[112] 325 U.S. 761 (1945).

[113] ARIZONA CODE ANN., 1939, § 69-119: "It shall be unlawful for any person, firm, association, company or corporation, operating any railroad in the state of Arizona, to run, or permit to be run over his, their, or its lines or road, or any portion thereof any train consisting of more than seventy (70) freight, or other cars, exclusive of caboose. It shall be unlawful for any person, firm, association, company or corporation, operating any railroad in the state of Arizona to run, or permit to be run, over his, their, or its line or road, or any portion thereof, any passenger train consisting of more than fourteen (14) cars. Any person, firm, association, company, or corporation, operating any railroad in the state of Arizona, who shall wilfully violate any of the provisions of this act, shall be liable to the state of Arizona for a penalty of not less than one hundred dollars ($100), nor more than one thousand dollars ($1000), for each offense; and such penalty shall be recovered, and suit therefor brought by the attorney-general, or under his direction, in the name of the state of Arizona, in any county through which such railway may be run or operated, provided, however, that this act shall not apply in cases of engine failures between terminals."

[114] See note 81 *supra.*

[115] 325 U.S. 761, 781-782 (1945). Justices Black and Douglas dissented.

The fact that the Court found that there was no reasonable connection between the length of trains and the danger of accidents is sufficient to invalidate the statute under the due process clause of he Fourteenth Amendment,[116] but the Court also decided that interstate train lengths were a matter of national concern.

If the same regulation had been imposed by a state in which the interstate movement originated or terminated, the effect on interstate commerce would have been substantially the same. The movement rationale was immaterial in so far as the reasoning of the Court was concerned. Since neither the movement rationale nor historical criteria were determining factors, why did the Court classify interstate train lengths as national in nature? The Court believed that uniform regulation of this matter was necessary in order to have an efficient transportation system. In other words the Court made a value judgment. It weighed the local interest in having the regulation against the national interest in not having the regulation and concluded that the national interest was superior. The classification of interstate train lengths, for the purpose of this case, as national in nature was a means of explaining the value judgment.

Length of trains, however, is also affected by the fact of whether the trains carry cabooses. The Illinois Commerce Commission ordered that certain trains, some of which were engaged in interstate commerce, carry cabooses. The Court, nevertheless, upheld the validity of this order, saying:

> "It [the order] finds its origin in the local climatic conditions and in the hazards created by particular local physical structures, and it has rather obvious relation to the health and safety of local workmen." [117]

Even though the length of trains was not a matter of local concern as was held by the Court in the *Southern Pacific* case, the value of local protection of health and safety was more important than the value of preventing the interference to commerce occasioned by the local regulation.[118] The local safety protection gained by virtue of the caboose regulation was far more significant than the dubious local safety measures occasioned by the Arizona regulation of train lengths. Likewise, the interference with national commerce occasioned by the Illinois regulation was probably not as great as the interference occasioned by the Arizona regulation.

Since comparisons of the values involved in permitting or not permitting local regulations are substantial factors in explaining the results reached, it will be well to consider elements which have entered into such comparisons.

---

[116] See note 50 *supra.*

[117] Terminal R. Assn. v. Brotherhood of Trainmen, 318 U.S. 1, 8 (1943).

[118] Although both the Arizona and Illinois regulations affected train length, the Illinois regulation concerned only cabooses, and thus increased train length while the Arizona regulation limited train length.

(b) *Commerce as Business*

In the case of *Welton v. Missouri*,[119] Missouri attempted to require a license of all peddlers who sold in the state goods grown, produced, or manufactured outside of the state. The Court held that the tax was unconstitutional because it discriminated against interstate commerce. The Court could have explained its conclusion in terms of the movement rationale by viewing the situation as movement of goods from one state to another to be sold in the latter. The privilege of selling could have been classified as an inseparable part of the movement. The tax would thus have been on interstate commerce and void.[120] The Court, nevertheless, invalidated the tax because it discriminated against interstate commerce. The national value in not having the tax was more important than the local value in having it.

The discrimination rationale was a method of measuring and explaining the values involved in the competing demands of state and national interests. The test of discrimination as applied to the regulation of commerce viewed as business would basically be the determination whether interstate commerce is placed in a less favorable position than intrastate commerce. The Missouri license tax applied only where out of state goods were concerned; therefore, the selling of the goods was more difficult after the enactment of the Missouri statute than before it was enacted.

Four factors may be considered in order to determine the existence of discrimination: (1) the position of the interstate commerce before the state regulation, (2) the position of the interstate commerce after the state regulation, (3) the position of comparable intrastate commerce before the regulation, and (4) the position of comparable intrastate commerce after the regulation. It is possible, however, for discrimination to be present and for local interests still to outweigh national interests.

Florida, for example, passed a statute[121] which made it unlawful for any one to sell, offer for sale, ship, or deliver for shipment, any citrus fruits which were immature or otherwise unfit for consumption. Since the purpose of the statute was to protect the state's reputation for producing wholesome fruit, the statute made interstate commerce in immature citrus fruits impossible. Even

---

[119] 91 U.S. 275 (1875).

[120] See note 89 *supra*.

[121] FLA. SESS. LAWS, 1911, p. 205, chap. 6236: "Section 1. That it shall be unlawful for anyone to sell, offer for sale, ship or deliver for shipment any citrus fruits which are immature or otherwise unfit for consumption, and for anyone to receive any such fruits under a contract of sale, or for the purpose of sale, or of offering for sale or for shipment or delivery for shipment. This section shall not apply to sales or contracts for sale of citrus fruits on the trees under this section; nor shall it apply to common carriers or their agents who are not interested in such fruits, and who merely are receiving the same for transportation."

though intrastate commerce in immature fruit was likewise prohibited, the basic objective constituted discrimination against interstate commerce. The Court, nevertheless, held the statute valid, saying:

> "Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state." [122]

The value to Florida in maintaining its reputation for wholesome fruit outweighed the value to the nation in receiving immature fruit. (The question of the value of receiving immature fruit for the purpose of making wine, citric acid, etc., was not included in the record and was not considered by the Court.) Even though discrimination was present, considering the purpose of the statute, and the discrimination was deliberate, the statute was valid.

Discrimination can be deliberate or it can be incidental to other purposes which a state has in mind in making the regulation. Whether the purpose of the regulation or the effect of the regulation constitutes the discrimination would seem, however, to be immaterial. Discrimination is discrimination.

But in passing on the constitutionality of a Madison, Wisconsin, ordinance which prohibited the sale of milk unless bottled within five miles from the central square of the city,[123] the Court commented:

> "A different view that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance when a state artlessly discloses an avowed purpose to discriminate against interstate goods." [124]

The basic purpose of the Florida statute was to prevent interstate commerce in immature fruits in order to protect the fruit reputation of the state,

---

[122] Sligh v. Kirkwood, 237 U.S. 52, 60 (1914).

[123] General Ordinances of the City of Madison, 1949, § 7.21: "It shall be unlawful for any person, association, or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the City of Madison otherwise known as the Capitol Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health."

"§ 7.11. It shall be unlawful for any person to bring into or receive into the City of Madison, Wisconsin, or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product as defined in this ordinance from a source not possessing a permit from the Health Commissioner of the City of Madison, Wisconsin.

"Only a person who complies with the requirements of this ordinance shall be entitled to receive and retain such a permit.

"On the filing of an application for a permit with the Health Commissioner, he shall cause the source of supply named therein to be inspected and shall cause all other necessary inspections and investigations to be made. The Department of Public Health shall not be obligated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison otherwise known as the Capitol Square."

[124] Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349, 354 (1951).

but still the statute was held valid. If the national interest which was being discriminated against had been far more substantial, a more difficult problem would have been presented. Whether discrimination is the purpose or the effect of the state regulation would seem, therefore, to be immaterial.

The case involving the Madison ordinance pitted the value of a national market for producers of milk against the local value of protecting the public health. Protection of the public health is a necessary duty of the local government, and there is no question that such regulations satisfy the due process clause of the Fourteenth Amendment,[125] but one of the fundamental purposes of the commerce clause is the prevention of economic barriers among states. Other means were available, in the opinion of the Court, to protect adequately the local health interests without erecting a complete barrier to the national interest. The Court, therefore, concluded that the Madison ordinance was invalid.[126]

The Madison ordinance involved a rather high barrier in that it was impossible for a farmer who bottled his milk more than five miles away to sell his milk in the city. A local regulation which does not constitute a complete prohibition of such sales, but merely involves obstacles which can be overcome with more effort than was needed before the regulation was imposed, presents a closer question. The interference with national interests is not as great as a complete barrier presents.

A Florida statute required the inspection of all imported cement and payment of a fee of fifteen cents per hundred pounds for such inspection.[127] Protection of the local citizens against defective building materials was just as important as the protection of their health. Bodily harm and death could be caused just as easily by falling buildings as by disease and infection. The Court, nevertheless, holding the statute unconstitutional, stated:

> "That no Florida cement needs any inspection while all foreign cement requires inspection at a cost of fifteen cents per hundred weight is too violent an assumption to justify the discrimination here disclosed. The other justification—the competitive effect of foreign cement in the Florida market—is rather a candid admission that the very purpose of the statute is to keep out foreign goods." [128]

---

[125] See note 50 *supra.*

[126] Justices Black, Douglas, and Minton, dissenting, commented, "This health regulation should not be invalidated merely because the Court believes that alternative milk-inspection methods might insure the cleanliness and healthfulness of Dean's Illinois milk." 340 U.S. 349, 358 (1951).

[127] COMP. GEN. LAWS SUPP. FLA. §§ 4151(512) to 4151(519). (See State ex rel. v. Hale, 129 Fla. 588, 176 So. 577 (1937), for statutes.)

[128] Hale et al. v. Bimco Trading, Inc., 306 U.S. 375, 380 (1939).

The national interest in maintaining a free market was important just as it was in *Dean Milk Co. v. Madison*,[129] but the Court felt that the local interest which the legislature wanted to protect was mostly economic. The legislature hid the real interest in what purported to be a safety measure against defective building materials. Since the means of livelihood of segments of a local population may depend upon factors of the local economy, local economic values can be just as important as health and safety values.[130] If the real value to be protected locally is economic, the national value in maintaining free commerce must be weighed against the local economic values promoted by virtue of the regulation. The local economic value in the cement industry promoted by virtue of the Florida regulation was not as important as the national value inherent in free commerce in that commodity.

The Court, on the other hand, in the case of *Cities Service Gas Co. v. Peerless Oil & Gas Co.*,[131] decided that a local economic value gained by virtue of a regulation was more important than the detriment caused by the regulation to national commerce. The Oklahoma Corporation Commission established prices for natural gas at the wellhead and ordered a purchaser to buy ratably from particular producers. Since the gas was sold in interstate commerce, the effect of the state regulation would follow that commerce. The Court, however, commented:

> "The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions. . . . That a legitimate local interest is at stake in this case is clear. . . . We recognize that there is also a strong national interest in natural gas problems. But it is far from clear that on balance such interest is harmed by the state regulations under attack here." [132]

---

[129] See note 124 *supra*.

[130] See Bison, *Economic Protective Powers of States Under Commerce Clause*, 38 GEO. L. J. 590 (1950). Mr. Justice Cardozo, rendering the opinion of the Court in Baldwin v. Seelig, 294 U.S. 511, 523, stated, "Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to makes its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief list or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

[131] 340 U.S. 179 (1950). *Cf.* Natural Gas Pipeline Co. v. Panoma Corp. et al., 349 U.S. 44 (1955).

[132] *Id.* at 186-187.

State interest in conserving gas was likewise a national interest, but state interest in seeing that reasonable economic rewards flowed to her citizens for the sale of the gas did not necessarily coincide with national interests.[133] The national interest was to promote and encourage commerce in such products. Cheaper prices tended to increase the commerce. The Court justified the compromise of the national interest by saying:

> ". . . the wellhead price of gas is but a fraction of the price paid by domestic consumers at the burner-tip, so that the field price as herein set may have little or no effect on the domestic delivered price." [134]

The value in promoting a substantial state economic interest is thus recognized even though there is a slight detriment to national commerce. The problem remains, however, to determine the degree of state interest as compared to the degree of national interest.

It is to be noted in viewing interstate commerce as business that it makes no difference whether the state obstacle or barrier is placed at the market end of the commerce or at the supply end. The regulation can constitute just as much friction for the commerce irrespective of where it is located.

In *Hood v. DuMond,*[135] the New York Commissioner of Agriculture and Markets denied the request of Hood Company to establish additional facilities for a milk plant because he was not satisfied "that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license will be in the public interest." [136]

The Supreme Court in passing on the constitutionality of the commission's action, summed up the issue:

> "This case concerns the power of the State of New York to deny additional facilities to acquire and ship milk in interstate commerce where the grounds of denial are that such limitation upon interstate business will protect and advance local economic interests." [137]

The barrier to the interstate commerce was at the first processing point instead of the market area but the effect on interstate commerce was the same. Local economic interests were competing with national economic interests. How much did the regulation hurt national commerce, and how much did the regulation help local economic interests?

---

[133] See Holloway, *State Regulation of Minimum Field Gas Prices,* 4 OKLA. L. REV. 69 (1951).
[134] 340 U.S. 179, 187 (1950).
[135] 336 U.S. 525 (1949).
[136] *Id.* at 528.
[137] *Id.* at 526.

The local regulation, in the eyes of the Court, was practically a complete barrier to potential interstate commerce in the area where Hood Company proposed to establish the new facilities. The argument that Hood Company could enlarge plant facilities in other areas and thus increase commerce was answered with the proposition that the willing sellers were in the area where Hood Company wanted to establish a new plant. Milk was of such a nature that the plant with its cooling facilities had to be located near the producing area.

The importance of the national economic interests was so great that it tended to dwarf the local economic interests. The Court even suggested that a local economic interest could never be sufficient to justify a regulation which imposed a curtailment of or a burden on interstate commerce.[138]

The point is that the New York regulation hurt the national interests too much in relation to the help which it provided for local interests. The Oklahoma gas regulation, on the other hand, did not hurt the national interests very much yet it helped considerably the local interests.[139] The balance of the scales lies somewhere between these two sets of conflicting values.

4. Conclusion

The issue of whether the exercise of state power in particular situations has gone beyond the constitutional limits as prescribed by the commerce clause has continued throughout the history of the United States Constitution. In spite of diligent attempts to define the areas in which state power could be legitimately exercised, such litigation has continued.

The Court since the *Cooley* case has usually explained the boundaries of these areas in terms of the nature of the subject matter regulated and/or the discriminatory character of the regulation. In a consideration of the nature of the subject matter, the issue involves determining whether the subject matter demands uniformity of regulation or is local in nature. The phase of the movement regulated is merely one factor to be considered in making this classification. The judicial procedents are, of course, of value in making this classification, but no one factor alone is determinative of the results. The over-all

---

[138] See Mendelson, *Recent Developments in State Power to Regulate and Tax Interstate Commerce*, 98 U. Pa. L. Rev. 57, 62 (1949): "If the *Hood* case has meaning beyond settlement of the immediate questions there at issue, it indicates abandonment of the ninety-eight year old *Cooley* doctrine—hitherto an unquestioned landmark in constitutional law. It is a switch from an *ad hoc*, mediatory weighing of national and local claims to "health, safety and fraud" as the touchstone of state regulatory power affecting commerce among the several states. The static, pristinely dictionary, sense in which Jackson uses the words "health," "safety" and "fraud" in the *Hood* case indicates a much restricted area of state competence, as well as a change in the Court's conception of its function in federalism cases—from mediation to adjudication."

[139] Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950).

problem is the weighing of local values gained by virtue of a local regulation against national values harmed by virtue of the regulation. An analogy to issues decided under the Fourteenth Amendment is not out of place in weighing these local values to determine the validity of the regulation, but even though the regulation satisfies the requirements of the Fourteenth Amendment, the local value in having the regulation must still be of greater importance than the national value of freedom from the local regulation, in order to hurdle the commerce clause.

This does not mean, however, that the *Cooley* formula is a useless thing thrown into the situation to delude lawyers into believing that the areas of state power are well defined. The *Cooley* formula tends to promote uniformity of decision by clarifying the issue. The nature of the subject matter—local or not local—becomes the point of comparison. The *Cooley* formula is helpful in comparing the precedent with the issue at hand, and to that extent, constitutes a part of the process of resolving the issue at hand. After the issue has been resolved, the *Cooley* formula is helpful in explaining the result in relation to precedents.

Discrimination likewise is a term used to describe conclusions of relative values. The all important problem again is the weighing of local values gained by virtue of a local regulation against national values harmed by virtue of that regulation. If the national values are of greater importance, the invalidity of the regulation can be explained in terms of discrimination. Precedents are helpful in defining discrimination and to that extent the discrimination test is helpful in resolving new issues.

Use of the *Cooley* formula and the discrimination tests are not, however, mutually exclusive. Likewise viewing interstate commerce as movement does not exclude the possibility of viewing that same commerce as business. Whether the commerce is viewed as business or as movement or both, the validity of the local regulations involves the same basic issue. If the local regulation would be invalid under either the *Cooley* or discrimination tests in relation to the precedents, then the local regulation should be declared unconstitutional, or the inconsistent precedents should be overruled. If the local regulation is so distinguishable from all precedents, the basic issue of local values against national values must be resolved. Distinctions from the precedents can be a matter of degree. If this matter of degree is so great that all precedents are distinguishable from the issue at hand, a new value judgment must be made.

In determining the issues of degree or in making new value judgments, the Court should keep in mind that the nation lives on a national economy. States,

however, are essential to our federal system; therefore, local interests must be protected in order to preserve our federal system. The protection afforded the local interests must not, however, be permitted to interfere seriously with the national economy. The Court must see the trees as well as the forests and protect both for their common good.